The Merger Control Review

Third Edition

Editor

Ilene Knable Gotts

Law Business Research

The Merger Control Review

THIRD EDITION

Reproduced with permission from Law Business Research Ltd.

This article was first published in The Merger Control Review, 3rd edition
(published in August 2012 – editor Ilene Knable Gotts).

For further information please email
Adam.Sargent@lbresearch.com

The Merger Control Review

THIRD EDITION

Editor
Ilene Knable Gotts

Law Business Research Ltd

The Law Reviews

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING MANAGERS
Nick Barette, Katherine Jablonowska

MARKETING ASSISTANT
Robin Andrews

EDITORIAL ASSISTANT
Lydia Gerges

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITOR
Caroline Rawson

SUBEDITOR
Davet Hyland

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-907606-40-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ACCURA ADVOKATPARTNERSELSKAB

ADVOKATFIRMAN CEDERQUIST KB

ADVOKATSKO DRUZHESTVO ANDREEV, STOYANOV & TSEKOVA in cooperation with SCHOENHERR

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ALTIUS

ANDERSON MŌRI & TOMOTSUNE

ANDREAS NEOCLEOUS & CO LLC

ARAUJO E POLICASTRO ADVOGADOS

ASHURST AUSTRALIA

BARNERT EGERMANN ILLIGASCH RECHTSANWÄLTE GMBH

BLAKE, CASSELS & GRAYDON LLP

BREDIN PRAT

COCALIS & PSARRAS

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ, SC

CUATRECASAS, GONÇALVES PEREIRA

DILLON EUSTACE

ELIG, ATTORNEYS-AT-LAW

ENS (EDWARD NATHAN SONNENBERGS)

GIANNI, ORIGONI, GRIPPO, CAPPELLI & PARTNERS

HOUTHOFF BURUMA

KING & WOOD MALLESONS

LCS & PARTNERS

LUTHRA & LUTHRA LAW OFFICES

MARVAL, O'FARRELL & MAIRAL

MORAVČEVIĆ VOJNOVIĆ ZDRAVKOVIĆ IN COOPERATION WITH SCHOENHERR

MOTIEKA & AUDZEVICIUS

MUJTABA JAMAL LAW ASSOCIATES

NCTM

PELIFILIP

PÉREZ BUSTAMANTE & PONCE

ROSCHIER ATTORNEYS LTD

SCHOENHERR

SLAUGHTER AND MAY

SRS – SOCIEDADE REBELO DE SOUSA & ADVOGADOS ASSOCIADOS, RL

TAVERNIER TSCHANZ

WACHTELL, LIPTON, ROSEN & KATZ

WIESNER & ASOCIADOS ABOGADOS

WILMER CUTLER PICKERING HALE AND DORR LLP

WILSON SONSINI GOODRICH & ROSATI, LLP

WONGPARTNERSHIP LLP

YULCHON LLC

ZULFICAR AND PARTNERS LAW FIRM

CONTENTS

Editor's Preface vii
Ilene Knable Gotts

Chapter 1 ARGENTINA 1
Miguel del Pino and Santiago del Rio

Chapter 2 AUSTRALIA 16
Peter Armitage, Amanda Tesvic and Ross Zaurrini

Chapter 3 AUSTRIA 31
Isabella Hartung and Wolfgang Strasser

Chapter 4 BELGIUM 41
Carmen Verdonck and Jenna Auwerx

Chapter 5 BOSNIA AND HERZEGOVINA 55
Srđana Petronijević and Christoph Haid

Chapter 6 BRAZIL 65
Bruno L Peixoto

Chapter 7 BULGARIA 75
Christoph Haid and Mariya Papazova

Chapter 8 CANADA 84
Julie A Soloway and Cassandra Brown

Chapter 9 CHINA 106
Susan Ning

Chapter 10 COLOMBIA 114
Dario Cadena Lleras and Eduardo A Wiesner

Chapter 11 CROATIA 122
Christoph Haid

Chapter 12 CYPRUS 130
Elias Neocleous and Ramona Livera

Chapter 13 DENMARK 140
Christina Heiberg-Grevy and Malene Gry-Jensen

Chapter 14 ECUADOR 147
Diego Pérez-Ordóñez and José Urízar

Chapter 15 EGYPT 155
Firas El Samad

Chapter 16 EUROPEAN UNION 163
Mario Todino, Piero Fattori and Alberto Pera

Chapter 17 FINLAND 178
Niko Hukkinen and Sari Rasinkangas

Chapter 18 FRANCE 188
Hugues Calvet and Olivier Billard

Chapter 19 GERMANY 204
Götz Drauz and Michael Rosenthal

Chapter 20 GREECE 212
Alkiviades C A Psarras

Chapter 21 HUNGARY 221
Christoph Haid and Anna Turi

Chapter 22 INDIA 234
Rajiv K Luthra and G R Bhatia

Chapter 23 INDONESIA 245
Theodoor Bakker and Luky I Walalangi

Chapter 24 IRELAND 256
Lorcan Tiernan and Sinéad O'Loghlin

Chapter 25 ITALY 267
Luca Toffoletti and Emilio De Giorgi

Chapter 26 JAPAN 279
Yusuke Nakano, Vassili Moussis and Tatsuo Yamashima

Chapter 27 KOREA 290
Sai Ree Yun, Seuk Joon Lee, Cecil Saehoon Chung and Kyoung Yeon Kim

Chapter 28 LITHUANIA 297
Giedrius Kolesnikovas, Emil Radzihovsky and Beata Kozubovska

Chapter 29 MEXICO 307
Luis Gerardo García Santos Coy, José Ruíz López and Mauricio Serralde Rodríguez

Chapter 30 NETHERLANDS 317
Gerrit Oosterhuis and Weijer VerLoren van Themaat

Chapter 31 PAKISTAN 329
Mujtaba Jamal, Fareed Yaldram and Sara Hayat

Chapter 32 PORTUGAL 338
Gonçalo Anastácio and Alberto Saavedra

Chapter 33 ROMANIA 350
Carmen Peli and Carmen Korşinszki

Chapter 34 SERBIA 362
Srđana Petronijević and Christoph Haid

Chapter 35 SINGAPORE 373
Ameera Ashraf

Chapter 36 SOUTH AFRICA 382
Lee Mendelsohn and Amy van Buuren

Chapter 37 SPAIN 395
Cani Fernández, Andrew Ward and Albert Pereda

Chapter 38 SWEDEN 408
Fredrik Lindblom and Amir Mohseni

Chapter 39 SWITZERLAND 417
Pascal G Favre and Silvio Venturi

Chapter 40 TAIWAN 426
Victor I Chang, Margaret Huang and Jamie C Yang

Chapter 41 TURKEY 437
Gönenç Gürkaynak and K Korhan Yıldırım

Chapter 42 UKRAINE 447
Christoph Haid and Pavel Grushko

Chapter 43 UNITED KINGDOM 452
Michael Rowe and Jordan Ellison

Chapter 44 UNITED STATES 463
Ilene Knable Gotts

Chapter 45 INTERNATIONAL MERGER REMEDIES 471
John Ratliff and Frédéric Louis

Appendix 1 ABOUT THE AUTHORS 485

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS 517

EDITOR'S PREFACE

Perhaps one of the most successful exports from the United States has been the adoption of mandatory pre-merger competition notification regimes in jurisdictions throughout the world. Although adoption of pre-merger notification requirements was initially slow – with a 13-year gap between the enactment of the United States' Hart-Scott-Rodino Act in 1976 and the adoption of the European Community's merger regulation in 1989 – such laws were implemented at a rapid pace in the 1990s, and many more were adopted and amended during the past decade. China and India have just implemented comprehensive pre-merger review laws, and although their entry into this forum is recent, it is likely that they will become significant constituencies for transaction parties to deal with when trying to close their transactions. Indonesia also finally issued the government regulation that was needed to implement the merger control provisions of its Antimonopoly Law. Many of the jurisdictions that were 'early adopters' have either refined their processes and procedures in substantial ways or have proposals pending to do so, typically to conform their regime with the pre-merger regimes of other jurisdictions (e.g., Brazil, Canada and the UK). This book provides an overview of the process in each of the jurisdictions as well as a discussion of recent decisions, strategic considerations and likely upcoming developments in each of these. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

As shown in further detail in the chapters, some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). The US and China may end up being the outliers in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are a few jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. But, there are some jurisdictions that take a more expansive view. For instance, Turkey recently issued a decision finding that a joint venture ('JV') that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. Germany also takes an expansive view, by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, the Netherlands, Romania, Spain and Turkey). Some jurisdictions impose strict time frames by which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Brazil requires that the notification be made within 15 business days of execution of the agreements; and Hungary and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina and Serbia) for mandatory pre-merger review by federal antitrust authorities.

Most jurisdictions more closely resemble the European Union model than the US model. In these jurisdictions, pre-filing consultations are more common (and even encouraged), parties can offer undertakings during the initial stage to resolve competitive concerns, and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japanese Federal Trade Commission ('JFTC') announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved undertakings has sales in Austria as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are even to be provided with a redacted copy of the merger notification and have the right to participate in Tribunal merger hearings and the Tribunal will typically permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection against a clearance.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The US is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period for challenging a notified transaction.

As discussed below, it is becoming the norm in large cross-border transactions raising competition concerns for the US, EU and Canadian authorities to work closely with one another during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with that in Brazil, and Brazil's CADE has worked with Chile and with Portugal. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Serbia, Montenegro and Slovenia similarly maintain close ties and cooperate on transactions. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and EU on some mergers and entered into a cooperation agreement with the US authorities in 2011, and the US has also announced plans to enter into a cooperation agreement with India.

Minority holdings and concern over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, seem to be gaining increased attention in many jurisdictions, such as Australia. Some jurisdictions will consider as reviewable acquisitions in which only 10 per cent interest or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise 20 per cent of a target; and Japan and Russia, at any amount exceeding 20 per cent of the target). Jurisdictions will often require some measure of negative (e.g., veto) control rights, to the extent that it may give rise to *de jure* or *de facto* control (e.g., Turkey).

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the merger worldwide even though less than 10 per cent of each of the undertakings was attributable to Germany. Thus, it is critical from the outset for counsel to develop a comprehensive plan to determine how to navigate the jurisdictions requiring notification, even if the companies operate primarily outside some of the jurisdictions.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. As discussed in the last chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current environment, obtaining the approval of jurisdictions such as China and Brazil can be as important as the approval of the US or EU. This book should provide a useful starting point in this important aspect of any cross-border transaction being contemplated in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2012

Chapter 19

GERMANY

Götz Drauz and Michael Rosenthal[1]

I INTRODUCTION

Every dealmaker with experience in the European Union knows that German merger control is 'different' compared with the EU and most of the other national merger control regimes, and that these differences need to be taken seriously since the jurisdictional thresholds in Germany are low and the German competition authority, the Bundeskartellamt (rightly) has the reputation of being a very active watchdog.

However, in the recent past, the business community experienced a very welcome move of the German merger control system towards mainstream Europe, in particular, by the introduction of a second domestic turnover threshold and a more economic approach adopted in the Bundeskartellamt's decision practice as reflected in the authority's guidance paper 'Guidance on Substantive Merger Control' of March 2012.[2]

Further important changes are expected to take effect on 1 January 2013 with the 8th Amendment to the German Competition Act ('the GWB').[3] In fact, one of the main objectives of the 8th Amendment is bringing German merger control rules more in line with the rules provided for by the EU Merger Regulation. The planned changes include:

a substantive appraisal: introduction of the SIEC test (with the current dominance test becoming an example of a 'significant impediment to effective competition');

1 Götz Drauz is a partner and Michael Rosenthal is the managing partner of Wilson Sonsini Goodrich & Rosati, LLP's Brussels office.

2 The English language version of the guidance document is available on the German competition authority's website: www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/2012-03-29_Guidance_final_neu.pdf.

3 The currently applicable merger control rules can be found under Chapter VII (Sections 35–43) of the GWB. The text as well as comprehensive guidance materials and forms issued by the Bundeskartellamt are available, in English, French and in German, on the authority's website (see www.bundeskartellamt.de).

b jurisdictional test: deletion of the *de minimis* market exception from the filing requirement (reducing the *de minimis* market test to its role in the substantive review);
c procedure: changes to the statutory time limits (including introduction of the EU's 'stop-the-clock' possibility; automatic extension upon submission of a remedy proposal); and
d remedies: admissibility of behavioural remedies that are equivalent to divestitures in their effects (provided the 'effective control' of the remedies in each specific case is possible).

The planned introduction of the SIEC test should not take away much of the relevance of the recent 'Guidance on Substantive Merger Control' document since the dominance test – as in Article 2(2) and 2(3) of the EU Merger Regulation – will continue to be used as an important statutory example of when a concentration leads to a significant impediment of effective competition.

However, the question is whether, in the future, economic analysis will play a more central role in the Bundeskartellamt's enforcement practice comparable to the reviews carried out by the European Commission and the US agencies. In any event, even after the 8th Amendment and its significant changes enter into effect, German merger control will still continue to differ in some important aspects, including:
a substantive appraisal: continued application of the presumption of dominance (based on market shares);
b jurisdictional test: continued relevance of a different concentration test (whereby transactions below the control threshold can be caught);
c procedure: continued procedural flexibility as far as the formal requirements for a filing and the deadlines for the review are concerned; and
d remedies: continued use of remedies only in Phase II with a preference for upfront buyer solutions.

In the following sections, we will discuss the main rules and the most important aspects of the Bundeskartellamt's recent enforcement action based on the German merger control regime currently in force, with a particular emphasis on those rules and decisions that will be relevant for the business community once the 8th Amendment to the GWB enters into effect in 2013.

II THE MERGER CONTROL REGIME

i Jurisdiction

The German merger control regime provides for pre-merger filings. Accordingly, a proposed concentration must not be put into effect prior to obtaining clearance (or derogation from the suspension obligation) from the Bundeskartellamt. There is no specific deadline for the notification. A (simplified) jurisdictional test consists of the following steps:
a transaction amounts to a concentration, i.e., acquisition of:
   - control;

- all or a substantial part of another undertaking's assets;
- shares constituting 25 per cent or 50 per cent of capital or voting rights; or
- competitively significant influence;

b turnover thresholds provided for by German merger control rules are exceeded:[4]

- aggregate worldwide turnover of all undertakings concerned of more than €500 million;
- German turnover of at least one undertaking of more than €25 million; and
- German turnover of a second undertaking of more than €5 million;

c no *de minimis* exception;[5] and

d domestic effect.

The Bundeskartellamt is among the most active authorities in the EU's referral system: Articles 4(4) and 4(5) of the EU Merger Regulation provide for the possibility of pre-notification referrals at the initiative of the notifying parties, while Articles 9 and 22 provide for the (often problematic) possibility of post-notification referrals triggered by the Member States – an option used by the Bundeskartellamt on a regular basis.

ii Procedure

When the jurisdictional test is met, notification to the Bundeskartellamt is mandatory and must be made prior to implementation. The filing can be made as soon as the parties to the concentration can show a good faith intention to enter into an agreement. There is no filing deadline. The fact that a filing has been received will be published on the authority's website and the transaction thus can no longer be kept confidential.

The parties are prohibited from implementing a concentration notified to the authority before receiving clearance. Violation of this suspension obligation as well as the failure to notify at all can lead to the imposition of a fine (of up to €1 million for natural persons and up to 10 per cent of the aggregate group turnover of the undertakings concerned) and the invalidity under civil law of the contracts bringing about the concentration.

Once notified, the vast majority of cases are cleared after a Phase I inquiry (lasting one month). The maximum time frame for an in-depth review, encompassing Phase I and Phase II, is four months from the time of the complete notification. In straightforward cases, the Bundeskartellamt is generally prepared to clear the transaction 'without delay after receipt of the complete notification' well before Phase I has expired.[6]

---

4 Special rules apply for the calculation of turnover of financial services providers, insurance companies, companies active in the media sector (television broadcasting, radio, newspapers and periodicals), and certain trading activities.

5 There are exceptions for *de minimis* target companies and for *de minimis* markets (with the latter in all likelihood being abolished should the planned 8th Amendment to the GWB enter into effect in 2013).

6 See Section 2.2 of the Bundeskartellamt's information leaflet on German merger control, available at www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_

In more difficult cases, the Bundeskartellamt must inform the notifying parties within one month of receipt of the notification that it has initiated an in-depth investigation of the proposed merger. In the absence of any such communication by the end of Phase I, the proposed merger is deemed cleared by time lapse. A reasoned decision will only be issued following an in-depth investigation in Phase II.

Third parties such as competitors, suppliers and customers of the merging parties will generally have the opportunity to comment on a proposed merger in the context of information requests issued by the Bundeskartellamt in the course of its investigation, or to submit unsolicited comments. Third parties may thus raise concerns without having to request formal admission to participate in the proceeding.

Third parties whose economic interests will be substantially affected by a decision of the Bundeskartellamt may, however, formally intervene in the proceedings upon application and admission by the authority. Once admitted, these intervenors have the right to be heard, to submit comments on the proceeding, and to have access to the non-confidential part of the authority's file. They also have the right to appeal.

iii Substantive assessment

The substantive test carried out by the Bundeskartellamt under the existing merger control rules is whether the proposed transaction would lead to 'the creation or strengthening of a dominant position'. As discussed above, this dominance test is likely to be replaced (or rather complemented) by the EU's SIEC test following the entry into effect of the 8th Amendment to the GWB (expected for 1 January 2013).

According to its 'Guidance on Substantive Merger Control' of March 2012, the Bundeskartellamt first distinguishes between three broad categories of mergers: horizontal, vertical and conglomerate mergers. For each of these three categories, the German competition authority then distinguishes again between single and collective dominance.

For a finding of single and collective dominance, the German merger control regime currently provides for the following – rebuttable – presumptions: (1) a single undertaking has a share of at least one-third of the market; (2) three or fewer undertakings possess an aggregated share of at least 50 per cent of the market; or (3) five or fewer companies hold a combined market share of at least two-thirds.

However, in the Bundeskartellamt's more recent decision practice, these presumptions play only a very limited role with the authority reviewing the competitive effects brought about by the proposed merger in their overall context. The cooperative aspects of joint ventures will, in addition, be examined under the rules relating to anti-competitive agreements (Section 1 of the GWB).

When the Bundeskartellamt reaches the preliminary conclusion that a concentration raises competition concerns, in Phase II the parties have the possibility of offering commitments with a view to securing conditional approval. Conditions precedent

englisch/06MerkblattzurDeutschenFusionskontrolle_e.pdf. Also, in the absence of any mandatory form to be used, the notification of such cases can be brief.

(in which case the merger may not be implemented until the condition is satisfied), such as upfront buyer solutions, are generally preferred by the Bundeskartellamt.

The type of remedy that is most likely to be accepted by the Bundeskartellamt is a divestiture that removes the competition concerns by creating a new competitive entity or strengthening an existing competitor of the merging parties. In cases where such a structural remedy is not possible, the parties currently (i.e., prior to the 8th Amendment) face a very difficult time to convince the authority to accept any other remedy solution.

III YEAR IN REVIEW

i Jurisdiction

Domestic effect

'Foreign-to-foreign' transactions meeting the jurisdictional thresholds are subject to German merger control legislation unless the concentration has no effect on the German domestic market. It is highly advisable to discuss any claimed absence of such 'domestic effects' with the authority during informal guidance discussions. This is particularly true since the introduction of a second domestic turnover threshold in spring 2009.

In *EMC/Cisco*, the parties narrowly escaped a fine for gun jumping when they did not notify their joint venture distributing integrated data centres which was originally only active in the US. The Bundeskartellamt, in its case summary published on 25 January 2012, found that the parties had violated the filing obligation but refrained from imposing a fine in light of the insignificant effects of the joint venture on the markets in Germany.

Referrals

Parties to a merger in the EU must pay particular attention to strategic questions concerning possible referrals and the significant consequences of a referral request on the timeline of the deal and its substantive review. In the past, the Bundeskartellamt frequently requested referrals of mergers under review by the Commission in sectors with national sensitivities (e.g., telecoms, media, and energy).

For example, in 2011, the Commission agreed to refer the review of the acquisition of German regional cable operator KBW by Liberty Global Inc to the Bundeskartellamt. The referral request by the German authority added significant time to the clearance timetable, resulting in a total duration of approximately eight months from the time of notification to the Commission until (conditional) clearance by the Bundeskartellamt.

ii Procedure

Gun jumping

On 10 May 2011, the Bundeskartellamt fined Interseroh €206,000 for gun jumping in a case that did not raise any competition concerns. This was the second time in 2011 that the authority imposed a fine for implementing a merger without prior approval (after having settled the divestiture proceeding which, as a matter of policy, is initiated by the German competition authority in gun-jumping cases[7]).

Interestingly, this seems to be one of the first cases in which a 'voluntary' notice of a merger implementation without prior approval triggered a fine. Interseroh apparently came forward on its own initiative and reported the infringement of the suspension obligation. In the past, the Bundeskartellamt would not have imposed a fine in such a case, at least if the merger raised no concerns.

Procedure for assessment of a joint venture's cooperative aspects

Unlike under the EU Merger Regulation (in the case of full-function joint ventures), the Bundeskartellamt analyses the risk that a joint venture may lead to anti-competitive coordination between the parent companies (beyond the scope of the concentration) not necessarily as part of the merger control review but in a separate proceeding under Section 1 GWB – which may lead to significant delays.

For example, on 9 May 2012, the Bundeskartellamt issued a clearance decision regarding the creation of Agronovita, a joint venture for the distribution of potatoes. Despite an in-depth investigation of the concentrative aspects of the planned joint venture which lasted several months, the authority still opened a separate proceeding (where it will not be bound by any statutory time limits) to analyse the joint venture's cooperative elements.

iii Substantive assessment

Roadmap for substantive merger reviews

The issuance of the 'Guidance on Substantive Merger Control' document in March 2012 is a remarkable development as – even prior to the expected introduction of the SIEC test by means of the 8th Amendment to the GWB – it effectively already moves German merger review more in line with the European Commission's review under the EU Merger Regulation.

According to the Bundeskartellamt, the guidance document is aimed at merely summarising the approach used by the agency 'over the last years' in reviewing a merger. In reality, however, it lays out an analytical framework which, so far, was not reflected in the German competition authority's decisions but rather follows the 'roadmap' used by the European Commission in its guidelines and decisions.[8]

Remedies

On 3 February 2012, in *One Equity Partners/Linpac RTP*, the Bundeskartellamt issued one of its relatively rare conditional clearance decisions where it did not insist on a

7 See the Bundeskartellamt's Notice regarding the treatment of post-merger notifications (available at www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/Mitteilung_zur_Behandlung_nachtraeglich_angemeldeter_Zusammenschluesse.pdf).

8 See for a detailed discussion of the Commission's substantive review under the EU Merger Regulation distinguishing between horizontal, vertical and conglomerate effects: *Rosenthal/Thomas, European Merger Control*, C.H. Beck/Hart Publishing (2010), pages 83 et seq.

condition precedent but used a condition subsequent for the divestment – allowing the merger to be put into effect immediately following the clearance decision (which would only become invalid upon the failure of the parties to satisfy the condition).

In its case summary, the Bundeskartellamt stressed that the special circumstances of the case – namely the structuring of the divestment remedy as an auction and the sufficiently concrete interest by a number of potential buyers – made a timely divestment of the affected business unit likely thereby allowing the authority to choose this less burdensome condition.

IV OTHER STRATEGIC CONSIDERATIONS

i Acquisition of minority shareholdings

One distinguishing feature of German merger control is that the notification requirement is also triggered in case of the acquisition of minority shareholdings, namely the acquisition of at least 25 per cent of the target company's capital or voting rights or 'any other combination of undertakings enabling one or several undertakings to directly or indirectly exercise a competitively significant influence on another undertaking'.

As a result of this catch-all clause, unlike in the vast majority of merger control regimes across the globe, transactions can be notifiable with the Bundeskartellamt well below the 'control' threshold. Since the competitively significant influence test is broadly construed by the German competition authority, merging parties are faced with a significant degree of uncertainty regarding the notifiability of their minority shareholdings.

A 'significant influence' is found in cases where the minority shareholder's interests will (post-transaction) need to be taken into account by the target company's other shareholders and management. According to the authority's decision practice, as a rule of thumb, the acquisition of a financial interest of less than 20 per cent (without any additional rights attached) generally does not grant such influence.

There is no safe harbour, however, as exemplified by the *A-TEC/Norddeutsche Affinerie* case, where the authority found a competitively significant influence through a minority shareholding of only 13.75 per cent.[9] Normally, it is in cases where 20 per cent or more (up to 25 per cent) are acquired that a 'significant influence' is not unlikely and, therefore, it may be advisable to approach the authority requesting informal guidance.

Finally, the significant influence needs to be of 'competitive' relevance. As a general rule, this criterion will only be met in the case of horizontal and vertical but not in the case of conglomerate mergers. Accordingly, for example, the test will not be met where the minority interest is acquired by a financial investor that does not yet control another company active in the same or vertically related market(s) as the target company.

9 In *A-TEC/Norddeutsche Affinerie*, the target companies' shares were widely dispersed, the attendance rate at shareholder meetings was historically very low, and the acquisition of the 13.75 per cent share would have resulted in A-TEC holding by far the most significant interest in its competitor Norddeutsche Affinerie. On appeal, the decision was upheld.

ii Foreign Trade Act

According to an amendment to the Foreign Trade Act of 2009 ('the AWG'), the German Ministry of Economics and Technology may review acquisitions of 25 per cent or more of the voting rights in existing German undertakings by investors based outside the EU/EFTA in case of a threat to public policy or public security. The Ministry has the right to block the transaction if necessary to safeguard national interests.

Foreign investors are not required to file their transaction with the Ministry. However, the Ministry is entitled to initiate a review within three months of the execution of the purchase agreement. In order to gain legal certainty, the parties may apply for a certificate of non-objection. Submission of a complete application triggers a one-month review period after which the transaction becomes valid should no objections be raised.

If restrictions or even a prohibition are considered necessary, the Ministry must obtain approval of the federal government (i.e., a decision of the Federal Cabinet is required). This provision stresses the exceptional character of restrictions or prohibitions of foreign investments. In fact, the Ministry's FAQ stresses that the 'legislation allows the examination of foreign investments only in rare and exceptional cases'.[10]

V OUTLOOK AND CONCLUSIONS

Even prior to the planned introduction of the SIEC test in 2013, the Bundeskartellamt has slowly but steadily moved its substantive review under German merger control rules more in line with the European Commission's review under the EU Merger Regulation. The German authority's 'Guidance on Substantive Merger Control' largely follows the analytical framework used by the European Commission in its guidelines and decisions.

The different terminology used by the Bundeskartellamt results from the continued applicability of the dominance test and is of limited (if any) practical relevance. However, a question of practical relevance is the extent to which the Bundeskartellamt will be willing and (given its limited resources) able to embrace the economic analysis underlying significant parts of the Commission's approach.

Once the SIEC test has entered into effect, another important issue will be the extent to which the Bundeskartellamt will be willing to directly rely on the body of guidelines and decisions issued by the Commission under the EU Merger Regulation. Interestingly, in the legislative process of the 8th Amendment, so far, the Bundeskartellamt has insisted on a 'genuine' interpretation of the future SIEC test by itself and the German courts.

In conclusion, while we think that the analytical framework for the substantive review will be very similar, the Bundeskartellamt is unlikely to move to a full effects-based review as carried out by the Commission under the EU Merger Regulation. Instead, the Bundeskartellamt is likely to keep giving particular weight to familiar concepts such as market structure and market shares.

---

10 The relevant texts and guidance materials are available on the Ministry's website (see www.bmwi.de/BMWi/Navigation/ Service/gesetze,did=223394.html).

Appendix 1

ABOUT THE AUTHORS

GÖTZ DRAUZ

Wilson Sonsini Goodrich & Rosati, LLP
Götz Drauz's practice is focused on EU and German competition law. He has represented companies in some of the most significant merger matters. Named an 'elite' practitioner by *Global Competition Review*, Götz is recognised in all the principal directories as a leading competition lawyer. Prior to entering private practice, Götz served at the European Commission for 25 years, most recently as the Deputy Director-General for Competition and previously as the head of the Merger Task Force.

MICHAEL ROSENTHAL

Wilson Sonsini Goodrich & Rosati, LLP
Dr Michael Rosenthal is the managing partner of Wilson Sonsini Goodrich & Rosati's recently opened Brussels office. He advises clients in a wide range of industries on all aspects of EU and German competition law before the European Commission as well as the national competition authority and courts in Germany. Michael is listed as a leading competition lawyer in all of the major legal directories and is the co-author of the book *Rosenthal/Thomas, European Merger Control* (C.H. Beck/Hart Publishing, 2010).

WILSON SONSINI GOODRICH & ROSATI, LLP

Bastion Tower, Level 21
Place du Champ de Mars 5
1050 Brussels
Belgium
Tel: +32 2 274 57 00
Fax: +32 2 274 57 99
gdrauz@wsgr.com
mrosenthal@wsgr.com
www.wsgr.com